



Appeal number: EA/2019/0343/P

5 **FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

10

TIMOTHY BULLIMORE

Appellant

- and -

INFORMATION COMMISSIONER

**First
Respondent**

-and-

THE LEGAL SERVICES BOARD

**Second
Respondent**

15

**Before:
JUDGE MOIRA MACMILLAN
Sitting in Chambers on 20 May 2020**

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DECISION

1. The appeal is dismissed.

5 2. For the reasons stated below, the Tribunal's Decision is substituted for the Commissioner's Decision Notice.

3. There is a closed annex to this Decision in order not to undermine the Tribunal's conclusion on disclosure, which is subject to a rule 14 Order.

10 MODE OF HEARING

4. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.

5. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules.

15 6. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 432 and a closed bundle containing the disputed information.

REASONS

Background to Appeal

20 7. The Appellant made a request for information to the Legal Services Board ('the LSB') on 19 December 2018 as follows:

1. *Any correspondence (including letters and emails) which has passed between the LSB and the SRA [Solicitors Regulation Authority] in relation to the SRA's investigation and prosecution of Leigh Day (SRA v Day and Others, case no. 11502 – 2016; [2018] EWHC 2726 (Admin)).*

25 2. *The dates of any meetings between the LSB and the SRA at which the investigation/prosecution has been discussed.*

3. *The dates of any telephone conversations between the LSB and the SRA at which that investigation/prosecution has been discussed.*

30 4. *Any notes of the meetings and telephone conversations referred to in 3 and 4 above.*

8. The LSB responded on 15 February 2019. It stated that no information was held in respect of part (3) of the request and provided information in respect of part (2). It refused the information requested at part (1) in reliance upon s. 44 of FOIA and also initially refused part (4) in reliance upon s. 36.

9. The LSB’s decision in relation to part (4) changed following an internal review, and this information was subsequently disclosed.

10. The Commissioner issued Decision Notice FS50834455 on 20 August 2019, upholding the LSB’s decision in respect of part (1). She decided that the LSB is entitled
5 to rely on the s. 44 FOIA exemption because disclosure of the requested information is prohibited under s. 167 of the Legal Services Act 2007 (‘the Act’).

11. When making this decision the Commissioner considered ss. 167(1) & (2) of the Act and the accompanying Explanatory Note:

10 *“Under this section, “restricted information” is any information obtained by the Board in the exercise of its functions. A restricted person is the Board (including in its capacity as approved regulator or licensing authority) or a person authorised by the Board to carry out its functions. Restricted information must not be disclosed by a restricted person or by any person who has received the information from a restricted person. Section 168 provides an exception to this rule. Restricted information does not include*
15 *“excluded information”, namely information which was obtained more than 70 years before the date of disclosure, or which is already available to the public, or which is in an appropriately “anonymised” form so that information relating to a particular individual cannot be ascertained from it.”*

12. The Commissioner noted that the Appellant challenges whether the disputed
20 information is ‘restricted information’ pursuant to s. 167, on the basis that he disputes that it was obtained by the LSB in the exercise of its functions.

13. The Commissioner also considered the Appellant’s secondary argument, which is that, even if the disputed information were to be ‘restricted information’, it may still be
25 disclosable through one of the gateways provided by the Act. The Appellant cites ss. 168(2), 168(3)(a) and 171 as examples of such gateways. He also questions whether the LSB had a wider obligation to seek Leigh Day’s consent to the disclosure of the information.

14. The Commissioner considered the decision of the House of Lords *Hazell v Hammersmith and Fulham London Borough Council*¹. In that case Lord Templeman
30 held, in the context of s. 111 of the Local Government Act 1972, that the “functions” of a local authority should be understood as including “*those activities that Parliament has entrusted specifically to a local authority*”, rather than more general activities and obligations.

15. The Commissioner was satisfied that the LSB had adequately explained its powers
35 and duties, and that these had a statutory basis. She decided that the activities the LSB was carrying out when it received the information are functions that are specific to that authority. She concluded that the disputed information was provided to the LSB in the exercise of its functions, and is therefore ‘restricted information’. T

¹ [1992] 2 AC 1

16. The LSB had disclosed that the information was provided to it in the course of an investigation. At that stage it declined to name the investigation in question, but referred to it as ‘a separate investigation unconnected to the subject matter of the request.’ In its response to this appeal the LSB has confirmed that the investigation was into the Law Society’s oversight and monitoring of the SRA.

17. At paragraph 40 of the Decision Notice the Commissioner stated that there is no dispute by the Appellant that the information is not “excluded information” pursuant to s. 167(3). She did not therefore go on to consider whether the information was already in the public domain.

18. The Commissioner instead considered whether the LSB should have disclosed the information pursuant to any other gateway under the Act. She noted that s. 168(2) allows the disclosure of restricted information for the purposes of enabling the LSB to exercise its statutory functions, but concluded that this did not apply to the LSB’s obligations when responding to a FOIA request.

19. The Commissioner noted that s. 168(3) provides a list of circumstances in which the LSB may disclose restricted information, including at s. 168(3)(d) with the consent of the person to whom the restricted information relates. The Commissioner decided that the LSB has a discretion as to whether to disclose information under the Act. She further decided that the reasonableness of the LSB’s decision was not a matter for her to consider.

20. The Commissioner concluded that the withheld information was restricted information pursuant to s. 167, and that disclosure is prohibited by s. 167(1) unless the LSB exercises its discretion to disclose it under a relevant gateway. As the LSB had not done so, it was entitled to rely on the exemption in s. 44(1) of FOIA.

Appeal to the Tribunal

21. The Appellant’s Notice of Appeal dated 16 September 2019 raises a number of issues. His grounds of appeal rely on his submissions to the Commissioner dated 9 August 2019 and have been supplemented by detailed replies to each of the Respondents’ Responses. Not all of the matters raised are relevant to the Tribunal’s decision.

22. The Appellant has put forward three main grounds of appeal:

(1) The Commissioner has failed to consider whether the disputed information was already available to the public, and the LSB has failed to satisfy the burden of proof to show that it is not in the public domain. If the information is publicly available it would be ‘excluded information’ rather than ‘restricted information’, and not therefore barred from disclosure.

(2) The Commissioner has failed to consider whether the LSB had an obligation to consult Leigh Day about disclosure, both in the context of a FOIA request, and more generally in the context of a disclosure gateway under the Act.

5 (3) The Commissioner’s conclusion that the disputed information was received by the LSB in the exercise of its functions is flawed. This is because (i) the LSB cannot be involved in a live disciplinary investigation of a solicitor and (ii) conducting an investigation is not a function conferred on the LSB by the Act. The Appellant submits that carrying out an investigation, other than an investigation under ss. 24 and 26 of the Act, is an activity which is ancillary to the functions of the LSB.

10 23. The Commissioner’s Response dated 16 October 2019 maintains her analysis as set out in the Decision Notice.

(1) She acknowledges that the Notice fails to address whether the disputed information is already in the public domain, but contends that the Appellant’s submissions on this issue are misconceived.

15 (2) The Commissioner submits that the information was received by the LSB in the course of an investigation into an approved regulator, which is the exercise of a function under the Act.

(3) She contends that there is no obligation or duty under the Act for the LSB to seek consent in the context of a FOIA request, or in relation to a disclosure gateway decision.

20 24. The LSB’s Response dated 5 December 2019 adopts the Commissioner’s submissions on the first two grounds of appeal. In relation to the third ground, the LSB confirms the identity of the investigation during which the information was provided. It contends that its power to oversee and investigate concerns about approved regulators are the exercise of functions within the framework of Part 4 of the Act.

25 The Appellant’s Replies are dated 22 October 2019 and 16 December 2019. They emphasise the Appellant’s challenge to whether the LSB was exercising a function when it received the disputed information. In addition the Appellant submits that there is nothing to show that the information was within the scope of the LSB’s investigation, and that it cannot therefore be ‘restricted information’.

30 *The Law*

25. S. 44(1) of FOIA provides that information is exempt from disclosure if disclosure is prohibited by or under another enactment.

35 26. In the case of *Ofcom v Gerry Morrissey & IC [2011] UKUT 116 AAC*, the Upper Tribunal considered the application of s. 44 in circumstances where a public authority is afforded some discretion about whether to disclose information under a statutory gateway. It concluded that the role of the Commissioner, and on appeal the First-tier Tribunal, does not extend to considering whether the public authority has acted reasonably in the exercise of such a discretion:

40 “63. *In short, the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public*

authority has been dealt with in accordance with the requirements of Part I of FOIA. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking the questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge... ”

27. The LSB is a public authority whose functions are outlined in the Legal Services Act 2007. The ‘statutory bar’ upon which it relies is set out in s. 167 of that Act:

167 Restricted information

(1) Except as provided by section 168, restricted information must not be disclosed—

(a) by a restricted person, or

(b) by any person who receives the information directly or indirectly from a restricted person.

(2) In this section and section 168—

“restricted information” means information (other than excluded information) which is obtained by the Board in the exercise of its functions;

“restricted person” means—

(a) the Board (including the Board in its capacity as an approved regulator or a licensing authority),

(b) a person who exercises functions delegated under paragraph 23 of Schedule 1 or section 73 or by virtue of section 64(2)(k).

(3) For the purposes of subsection (2) “excluded information” means—

(a) information which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it;

(b) information which at the time of the disclosure is or has already been made available to the public from other sources;

(c) information which was obtained more than 70 years before the date of the disclosure.

28. The Act does not provide a definitive list of the LSB’s functions, but stipulates at s. 207 that the definition of ‘“functions” includes powers and duties’.

29. S. 168 sets out when restricted information may be disclosed:

168 Disclosure of restricted information

(1) A restricted person may disclose restricted information to another restricted person.

(2) *Restricted information may be disclosed for the purposes of enabling or assisting the Board to exercise its functions (whether as an approved regulator, a licensing authority or otherwise).*

5 (3) *Section 167 also does not preclude the disclosure of restricted information—*

(a) *where the disclosure is a result of the Board exercising any power to publish information under this Act;*

10 (b) *for the purposes of enabling or assisting the OLC, ombudsmen or persons who exercise functions delegated under paragraph 22 of Schedule 15, to exercise any of its or their functions,*

(c) *to an approved regulator for the purposes of enabling or assisting the approved regulator to exercise any of its functions,*

(d) *with the consent of the person to whom it relates and (if different) the person from whom the restricted person obtained it,*

15 (e) *for the purposes of an inquiry with a view to the taking of any criminal proceedings or for the purposes of any such proceedings,*

(f) *where the disclosure is required by or by virtue of any provision made by or under this Act or any other enactment or other rule of law, or*

20 (g) *to such persons (other than approved regulators) who exercise regulatory functions as may be prescribed by order made by the Lord Chancellor, for such purposes as may be so prescribed.*

(4) *Subsections (2) and (3) are subject to subsection (5).*

25 (5) *The Lord Chancellor may by order prevent the disclosure of restricted information by virtue of subsection (2) or (3) in such circumstances, or for such purposes, as may be prescribed in the order.*

30. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

30 (a) *that the notice against which the appeal is brought is not in accordance with the law, or*

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

35 *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

5 31. I note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

10 32. The Appellant has produced various guidance documents in support of his appeal, including the LSB paper ‘Arrangements for disciplinary oversight’ and the LSB’s response to two separate FOIA requests dated 23 October 2017 and 3 April 2020.

Submissions

Whether the information is or has already been made available to the public from other sources

15 33. The Appellant submits that the Commissioner mistakenly concluded that the question of whether the disputed information is “excluded information” was not in issue. He contends that the Decision Notice does not adequately explain why the Commissioner reached this conclusion.

20 34. The Appellant submits that there was a significant volume of information in the public domain, at the date of request, about the SRA’s conduct of the Leigh Day case. This included correspondence between the SRA and government departments; the identity of complainants; the SRA’s critical views of the SDT; and various costs and financial figures.

25 35. The Appellant contends that the disputed information is likely to be publicly available, but that he cannot provide evidence in support of his view as he has not seen the disputed information.

30 36. He submits that the burden of proof on this issue lies with the LSB, and that it has failed to discharge this burden. The Appellant argues that the LSB has merely asserted that the information is not in the public domain, without providing supporting evidence such as details of negative internet searches.

35 37. The Commissioner’s submissions, which the LSB adopts, acknowledge that the Decision Notice failed to address the issue of whether the information was publicly available. She submits, however, that the Appellant’s argument on this issue is misconceived. This is because the volume of publicly available information about the subject matter of the correspondence is irrelevant. The Commissioner contends that it is private correspondence, and that it remains so even if it refers to publicly known matters. She submits that private correspondence does not become public simply because it discusses public affairs.

38. The Commissioner acknowledges that the information will not be “restricted information” if it is publicly available. She agrees that the relevant test is whether, on the balance of probabilities, the information is publicly available. She submits that there is nothing before the Tribunal to suggest that the information is already in the public domain.

39. The Commissioner disputes that the LSB must provide evidence before declaring that information is not in the public domain. She submits that, in any event, there is no obligation to carry out such checks in circumstances where the answer is obvious, The Commissioner submits that the answer is obvious in this case.

40. The Commissioner suggests that the purpose of the reference to ‘excluded information’ in s. 167(3)(b) is to allow the LSB to refer to public information where it wishes to do so, without the risk of acting unlawfully.

Whether the LSB had an obligation to contact Leigh Day for consent

41. The Appellant contends that the LSB has made a tactical decision not to seek Leigh Day’s consent for the disputed information to be published, although the SRA and the SDT were consulted. He submits that, because s. 167 is silent on the need to consult, it should be read with s. 3 which requires the LSB to discharge its functions ‘with regard to principles under which regulatory activity should be transparent.’

42. The Appellant submits that the burden on the LSB in consulting Leigh Day would have been slight, and that the LSB’s policy of only seeking consent in circumstances where it is minded to disclose information is in breach of the transparency principle in s. 3.

43. The Commissioner’s submission, which the LSB again adopts, is that there is nothing in the Act which obliges the LSB to seek consent in relation to s. 168(3)(d) or any other disclosure gateway. Neither is it an implied obligation for the LSB to seek consent before responding to FOIA requests. The Commissioner argues that reading such an obligation into the Act would create an unreasonable burden on the LSB in the context of FOIA requests, and that, as a matter of public policy, it would be preferable for the requester to seek consent.

44. The Commissioner submits that inferring such an obligation into the Act would create difficulties for the LSB should it receive, for example, an information request relating to a regulatory body it supervises and which it may be currently investigating.

45. The Commissioner contends that the purpose of s. 168(3)(d) is to free the LSB of the risk of liability should any person from whom it receives information, and any person to whom the information relates, want the information to be disclosed.

Whether the information was provided to the LSB in the exercise of its functions

46. The Appellant submits that s. 35(2) of the Act prohibits the LSB from giving a direction to an approved regulator in respect of a specific disciplinary case. He relies on the LSB paper ‘Arrangements for disciplinary oversight’, which states that the LSB

does not currently review individual cases, and lacks the powers to do so. He submits that, in the same paper, the LSB asserts that it had not asked for, received, or reviewed any files from the SRA relating to the Leigh Day case and had instead followed up on the case through the regulatory performance framework.

5 47. The Appellant submits that, if the LSB required information about a live disciplinary investigation in the exercise of its functions, it should have issued a notice under s. 55 of the Act requiring the provision of relevant information.

48. The Appellant contends that no distinction can be made between the SRA's files; information from its files; and information based on its files. He submits that the
10 disputed information must have been/have been based on information from the SRA's files, or about the SRA's conduct of the case. He argues that, because the LSB did not have the power to receive or review any information about the Leigh Day case, it cannot have received the disputed information in the exercise of a function.

49. The Appellant asserts that the LSB has 'admitted' that the notes it disclosed in
15 response part (4) of his request, which are of discussions of the Leigh Day case between the LSB and SRA, were not received in the exercise of an investigatory power. He accuses the LSB of inconsistency.

50. The Appellant characterises the LSB's position as follows:

- 20 (1) It received the disputed information during an investigation unconnected to the Leigh Day case;
- (2) this investigation was a function of the LSB;
- (3) therefore the disputed information was received in the in the exercise of the LSB's functions.

51. The Appellant submits that investigation is not a function of the LSB under the Act
25 save under ss. 24 & 26, in conjunction with Schedule 6. He contends that the investigation must therefore have been incidental to the exercise of a function, pursuant to s. 7 which allows the LSB to '*do anything calculated to facilitate, or incidental to or conducive to, the carrying out of any of its functions*'. The Appellant submits that the investigation must have been the exercise of a power that is ancillary to a function.

30 52. He cites authorities including *R (Risk Management Partners Ltd) v LB Brent [2008] EWHC 692 (Admin)* to argue that an incidental power cannot by itself be a function (in that case again in the context of the Local Government Act), because otherwise there could be an infinite regression from incidental power to incidental power, each in turn being converted into a function.

35 53. The Appellant submits that there is a requirement for the prior identification of the function to which the acts in question are said to be incidental. He challenges the Commissioner's interpretation of *Hazell* and asserts that the power to do something incidental to a statutory function must be understood in the context of the statute as a whole. He submits the LSB must specify the statutory function in relation to which the
40 incidental power to investigate was being exercised.

54. The Appellant further challenges the Respondents' assertion that the disputed information was received in the course of the investigation of the Law Society and the SRA. He questions how, if so, information about the Leigh Day case could have been in scope of the LSB's investigation. He submits that it is incumbent on the LSB to explain why it received information about a live disciplinary case, when it is not part of its function to do so.

55. Finally, the Appellant refers to a more recent FOIA response by the LSB, reference 20200122-0, which published correspondence with the SRA without reference to s. 167 or s. 168. He submits that this indicates an inconsistent application of s. 167.

56. The Commissioner submits that the Act does not expressly list the functions of the LSB, and that the House of Lord's approach in *Hazell v Hammersmith and Fulham LBC* should be followed in relation to the identification of 'functions'. She describes this approach to functions as encompassing *'the sum total of the activities Parliament has entrusted to [the public authority]'*.

57. The Commissioner submits that the Appellant did not previously dispute whether the LSB's investigation amounts to the exercise of a function for the purposes of s. 167(2). She describes the power to investigate and to regulate approved regulators as a central function of the LSB. She submits that the LSB's powers to conduct such investigations are set out in Part 4 of the Act.

58. The Commissioner submits that s. 167 is intended to apply to information obtained by the LSB from third parties when conducting an investigation into an approved regulator. As the disputed information was received in such a context, she submits that it is clearly 'restricted information'.

59. The LSB adopts and expands on the Commissioner's submission. It submits that s. 167 (2) defines 'restricted information' as information obtained by the LSB in the exercise of its functions. The LSB supports the Commissioner's interpretation of *Hazell* and submits this authority further describes 'functions' as encompassing activities *'designed to facilitate, or [...] conducive or incidental to'* the discharge of those functions.

60. The LSB also refers to judicial consideration of *Hazell* in *R (on the application of Weaver) v London & Quadrant Housing Trust [2009] EWCA Civ 587*. In that case Elias LJ stated that:

"The concept of "functions" is not altogether straightforward, nor is the distinction between functions and acts. The difficulty was adverted to by Lord Neuberger in YL v Birmingham City Council.... He expressed the view that the former was more conceptual and noted that a number of acts may be involved in the performance of a function. In Hazell [...] Lord Templeman said that the word "functions", at least as to be construed in section 111 of the Local Government Act 1972, embraced:

"all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it."

This would suggest that a function is a sub-species of those duties and powers; although whether and when a specific power or duty can be equated with a function is more problematic.”

5 61. The LSB submits that the Act does not contain an express list of the LSB’s functions, but rather, at s. 207, defines ‘functions’ as including, but not being limited to, ‘powers and duties’. The LSB contends that it empowered to investigate approved regulators, and that is not simply an incidental power under the Act but is rather a necessary function and duty. It relies on s. 49(3) of the Act where its ‘*principle role*’ is described as ‘*the oversight of approved regulators*’.

10 62. The LSB contends that various provisions in Part 4 of the Act sets out a number of powers and duties in relation to this oversight. It submits that the investigation of potential shortcomings by an approved regulator is an integral part of oversight and must therefore be a function. It relies in particular on ss. 55 and 56, which empower the LSB to require an approved regulator to provide information or documents, and for the
15 enforcement of such a requirement by way of an application to the High Court.

63. The LSB submits that not every investigation requires service of a s. 55 notice and that it is an error to conclude that it is only exercising its investigatory function when receiving information under that section. It contends that reference must be made to the underlying functions the LSB is pursuing rather than looking at the means by which
20 those functions may be achieved.

64. The LSB submits that the disputed information was plainly received as part of an LSB investigation into the Law Society, an approved regulator, and the SRA to whom the Law Society has delegated certain functions. It acknowledges that it cannot intervene in an individual disciplinary case by virtue of s. 32(5), but argues this does
25 not prevent the receipt of information referring to such a case during an investigation of an approved regulator.

Analysis and Decision

65. As stated by the Upper Tribunal in *Ofcom v Morrissey and IC*, and confirmed in
30 *Information Commissioner v Malnick and ACOBA [2018] UKUT 72*, the role of the Commissioner is to decide whether a public authority has responded to a request for information in accordance with the requirements of Part 1 of FOIA.

66. The LSB relies on the absolute exemption contained in s. 44 FOIA. It submits the
35 disputed information is exempt from disclosure pursuant to s. 167 of the Act. The Tribunal must therefore take a view on the application of the statutory bar on disclosure in s. 167.

Is investigation a ‘function’ of the LSB?

67. S. 207 (1) of the Act provides as follows:

Interpretation

(1) In this Act, except where the context otherwise requires— ... "functions" includes powers and duties;

68. This is limited to some extent by s. 7 which refers to ‘supplementary powers’, which are anything done by the LSB ‘*calculated to facilitate, or incidental to or conducive to, the carrying out of any of its functions*’.

69. Similar language appears in s. 111 of the Local Government Act 1972, which is the subject matter of the authorities cited by the parties (“*a local authority shall have power to do anything (...) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions*”), and where these are described as ‘subsidiary powers’. However, the LGA does not contain a general definition of ‘functions’ such as that in s. 207 of the Legal Services Act 2007.

70. The LSB’s functions under the Act are further considered in s. 49:

(1) The Board must prepare and issue a statement of policy with respect to the exercise of its functions under—

(a) section 31 (performance targets and monitoring);

(b)section 32 (directions);

(c) section 35 (public censure);

(d) section 37 (financial penalties);

(e) section 41 (intervention directions);

(f) section 45 (cancellation of designation as approved regulator);

(g) section 76 (cancellation of designation as licensing authority by order).

(2) The Board may prepare and issue a statement of policy with respect to any other matter.

(3) In preparing a statement of policy, the Board must have regard to the principle that its principal role is the oversight of approved regulators.

(4) The statement of policy prepared under subsection (1) must—

(a) take account of the desirability of resolving informally matters which arise between the Board and an approved regulator, and

(b) specify how, in exercising the functions mentioned in that subsection, the Board will comply with the requirements of section 3(3) (regulatory

activities to be proportionate, consistent and targeted only at cases in which action is needed, etc),

and, in preparing that statement, the Board must have regard to the principle that the Board should not exercise any of those functions by reason of an act or omission of an approved regulator unless the act or omission was unreasonable.

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(5) ...

(6) ...

(7) ...

(8) In exercising or deciding whether to exercise any of its functions, the Board must have regard to any relevant policy statement published under this section.

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(9) ...

(10) ...

71. The list in s. 49(1) is not a complete list of the LSB's functions, as it clearly does not include all of the LSB's 'powers and duties' under the Act. Rather it is a list of those functions in relation to which a policy statement must, as opposed to might, be published. The LSB retains discretion to publish policy statements on any other matter.

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72. When preparing such a policy statement the LSB must have regard to its principle role, which is the oversight of approved regulators. The primacy of this role is apparent in other parts of the Act, for example in s. 4, which sets out the LSB's function relating to the maintenance of standards by approved regulators, and s. 30 which requires the LSB to produce internal governance rules.

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73. Each of the functions listed in s. 49(1) requires the LSB to come to a view about the performance or activity of an approved regulator. In the exercise of several of these functions the LSB must consider the 'acts or omissions' of the approved regulator, must invite representation on the issue it is considering and must have regard to any representations made. Such a process may quite properly be described as 'an investigation'.

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74. Given this statutory framework, I cannot agree with the Appellant's submission that investigation is not a function of the LSB under the Act. Neither do I agree that any investigation carried out, other than under ss. 24 & 26, is an incidental power pursuant to s. 7. I must conclude that the LSB's oversight of approved regulators necessarily involves the exercise of investigative functions.

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75. The LSB have described its investigation of the Law Society and the SRA as being into a potential breach of its internal governance rules. These are rules that relate to the

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delegation of regulatory functions by approved regulators. As stated above, the LSB much publish such rules pursuant to s. 30.

76. The LSB's investigation was into breaches of the rules relating to oversight and monitoring arrangements. The investigation's findings resulted in the LSB issuing a statement of censure against the Law Society under s. 35 of the Act, which is one of the functions listed in s. 49(1).

77. Having considered the statutory framework and the context in which the LSB's investigation took place, I am satisfied that the LSB's investigation of the Law Society and the SRA was the exercise of one of its functions under the Act.

10 *Was the disputed information provided to the LSB in the course of the exercise of its functions?*

78. The Appellant is aware that the disputed information was provided in an email exchange on 3 October 2017. He submits that this information must have been outside the scope of the LSB's investigation, that it had no power to receive such information it and that it cannot therefore be said to have received the information in the course of the investigation.

79. Having considered the closed material, I find that the withheld information was obtained in the course of the LSB's investigation and that it engages s. 167. It does so explicitly. I also conclude that there is no basis upon which the disputed information could or should be viewed or treated differently from the other information in the email exchange.

80. Unfortunately for the Appellant, it is not possible to explain the basis of this conclusion in any more detail, given the restrictions of s. 167. I have addressed it in a short, closed annexe.

25 *Is the disputed information 'restricted information'?*

81. It is common ground between the parties that, under s. 167, information obtained by the LSB in the exercise of its function is 'restricted information', unless is it 'excluded information' pursuant to s. 167(3).

82. The Appellant submits that the LSB has failed to satisfy the burden of proof to show that the disputed information is not already in the public domain, and has not therefore demonstrated that it is not 'excluded information' pursuant to s. 167(3)(b).

Is the information already publicly available?

83. The LSB asserts that the disputed material is not in the public domain. The Appellant challenges this and draws attention to the LSB's lack of evidence to show that it has searched for the disputed information amongst the publicly available information about the Leigh Day case.

84. Having considered the nature of the disputed information, I am satisfied that it is appropriate to rely on the LSB's assertion that this information is not in the public domain. I have dealt with this briefly in the closed annexe.

5 85. I therefore conclude that the disputed information is 'restricted information' pursuant to s. 167.

Should the LSB have sought the consent of Leigh Day to disclose the requested information?

10 86. Under s. 168(3)(d) the LSB could have disclosed the restricted information with the consent of the person to whom the information relates, and of the person from whom the information was obtained. However, there is no obligation under either FOIA or ss. 167 & 168 for the LSB to seek such consent.

15 87. S. 168(3) provides a number of discretionary conditional circumstances in which it is open to the LSB to disclosure restricted information. There are also other possible disclosure gateways available to the LSB under the Act. In the context of this request disclosure of the information may have been at the discretion of the LSB, subject, for example, to it obtaining consent, including from Leigh Day. The LSB has chosen not to exercise any such discretion.

20 88. Having considered the Upper Tribunal's decision in *Ofcom v Morrissey & IC*, I am satisfied that the reasonableness or otherwise of the LSB's choice in this regard is not a matter this Tribunal should consider.

25 89. The Appellant submits that, since ss. 167 & 168 are silent on the need to consult, they should be read in light of requirement for transparency in s. 3. This is also not a matter this Tribunal can consider. A legal challenge to the LSB's exercise of discretion when carrying out its functions should be brought by way of an application for permission to seek judicial review.

Is the s.44 FOIA exemption engaged?

30 90. For the reasons given, I am satisfied that the disputed information is restricted information pursuant to s. 167(2). Although it was open to the LSB to seek the consent of the persons named in s. 168(3)(d), it was not obliged to do so. It was also not obliged to disclose the information through another gateway.

91. Absent one of the conditions in s. 168(3) being satisfied, disclosure of restricted information is prohibited by s. 167(1). This means that the disputed information is prohibited from disclosure by virtue of an enactment other than FOIA.

35 92. I conclude therefore that the LSB was therefore entitled to rely on the exemption under s. 44(1) of FOIA, by virtue of s. 167 of the Act, and to refuse to disclose the information in part (1) of the Appellant's request.

Was the Decision Notice in accordance with the law?

93. The Commissioner submits that any flaws in the reasoning of the Decision Notice were immaterial to the outcome reached. She further relies on the Tribunal's conduct of a full merits review.

5 94. At paragraph 40 of the Decision Notice the Commissioner concludes that the Appellant does not dispute that the information is not "excluded information" for the purposes of s. 167(3). As a consequence the Decision Notice does not consider whether the disputed information is already in the public domain. This forms part of the Appellant's grounds of appeal.

10 95. Having considered the Appellant's submissions to the Commissioner during her investigation, I am satisfied that the conclusion in paragraph 40 does not accurately reflect the Appellant's position.

96. I am also satisfied that this was an error of fact by the Commissioner, such that it is appropriate for the Tribunal's Decision to be substituted for the Commissioner's Decision Notice.

15 97. In the normal way a copy of this Decision was sent to the Commissioner and to the LSB for them to check the draft and make representations as to whether any parts of the Decision should not be disclosed. The version of the Decision provided to the Appellant and promulgated generally will have been redacted and/or edited if necessary in light of such representations.

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(Signed)

Judge Moira Macmillan

DATE: 15 June 2020

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